

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

JULES SHAMBERG d/b/a
JEWEL ELECTRIC

Employer¹

and

Case 4–RC–20126

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.²
3. The labor organization involved claims to represent certain employees of the Employer.

¹ The name of the Employer appears corrected.

² At the January 17, 2001 hearing, the Employer asserted that it did not meet the Board's jurisdictional standards. The Hearing Officer continued the hearing to permit the Petitioner an opportunity to present additional evidence on this issue. Thereafter, on February 6 the parties entered into a written stipulation that the Employer is in commerce, along with supporting facts. The stipulation was entered into the record, and the record was closed.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer, a sole proprietorship, is a commercial electrical contractor that performs service, maintenance and renovation work for commercial properties in Philadelphia and its suburbs. The Petitioner seeks to represent a unit of the Employer's journeyman electricians and helpers. The Employer asserts that the journeyman electricians are supervisors within the meaning of Section 2(11) of the Act.

Jules Shamberg is the Employer's sole owner, and he personally operates the business. The Employer employs four employees, journeyman electricians John Krieger and Charles Madden (herein called the journeymen) and helpers Edward J. Bennett, III, and Kenneth Casile (herein called the helpers). Customers pay the Employer on a "time and material" basis, i.e. based on a set hourly wage rate for labor, and the cost of materials plus a "mark-up."

Krieger, who has fifteen years experience in electrical work, earns \$15 per hour and Madden, who has nineteen years experience, earns \$18 per hour. Madden and Krieger have been employed by the Employer since November 28, 2000 and January 2, 2001, respectively. Bennett earns \$10.50 per hour, and Casile earns \$10 per hour. All of the employees will be eligible to receive health benefits after they are employed by the Employer for 90 days.

The Employer generates much of its business through service calls. After Shamberg receives a service call from a customer, he informs Krieger and/or Madden of the assignment, lays out the work to be performed, and provides the necessary equipment and materials. The journeymen often suggest what materials are required, and Shamberg then orders the materials and delivers them to the job site. Shamberg is sometimes present at the job site, but he is not there on a regular basis. When he is not present, Shamberg speaks with Krieger and Madden by cell phone approximately one to three times each day, and he encourages them to contact him if a problem arises. The journeymen instruct the helpers as to how to perform their tasks, check their work, ensure that they are always kept busy, and record the time they work. At the site, the journeymen exercise some discretion as to how to perform the job. Thus, Krieger testified that based on his experience he might need to decide which way to bend a pipe or mount a box. On one job a customer needed pipe installed for air conditioning thermostats. Shamberg showed Krieger where to find the units and condensers but allowed Krieger to decide how to bend the pipe and where to place it. Madden testified that he spends about seven hours of every day working directly with the tools and the remainder of the time communicating with Shamberg. The journeymen coordinate their work with the other trades at the job site as needed.

The journeymen track the materials they use and the amount of time they spend on a job by filling out "time and material slips." Shamberg bases his customer invoices on the time and material slips. Although Krieger and Madden record the amount of time the employees work, Shamberg verifies their entries by requiring them to sign in and out on a bulletin board at the job site. When customers have their own superintendents on the job, the superintendents also track the amount of time that the Employer's employees work.

During their brief tenures of employment, the journeymen have not played any role in the Employer's hiring process and have not discharged or otherwise disciplined any employees. Shamberg testified that he expects them to report any employee problems to him. On one occasion, Krieger recommended discharging an unproductive helper, but Shamberg did not follow this recommendation. Another time, Krieger told a helper that he was speaking too loudly about personal matters on the job and reported this conduct to Shamberg, who took no further action. Additionally, Madden once suggested taking measures to improve a helper's punctuality, but Shamberg did not follow this recommendation. Madden and Krieger do not have the authority to authorize pay raises, pay reductions, bonuses, or overtime. They also have no authority to promote or layoff employees or approve vacation requests.

A finding of supervisory status is warranted only where the individual in question possesses one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 717, 725 (1996); *The Door*, 297 NLRB 601 (1990). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise "independent judgment" in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. *Providence Hospital*, supra, 320 NLRB at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on employees. *Id.*; *Juniper Industries*, supra, 311 NLRB at 110. The authority effectively to recommend, "generally means that the recommended action is taken with *no* independent investigation by an individual's superiors, not simply that the recommendation ultimately is followed." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70 (1996) enf'd. 101 F.3d 107, 153 LRRM 2704 (2nd Cir. 1996), cert. denied 519 US 817, 153 LRRM 2736 (1996), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5th Cir. 1963); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enf'd. 961 F.2d 1578, 140 LRRM 2120 (6th Cir. 1992). Job descriptions or job titles suggesting the presence of supervisory authority are not given controlling weight. Rather, the Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *East Village Nursing Center v. NLRB*, 165 F.3d 960, 160 LRRM 2342, 2345-2346 (D.C. Cir. 1999); *Store Employees Local 347 v. NLRB*, 422 F.2d 685, 71 LRRM 2397, 2399-2400 (D.C. Cir. 1969); *NLRB v. Security Guard Services*, 384 F.2d 143, 66 LRRM 2247-2250 (5th Cir. 1969), enf'g. 154 NLRB 8 (1965); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

The burden of establishing supervisory status is on the party asserting that such status exists. *Fleming Companies, Inc.*, 330 NLRB No. 32, fn. 1 (1999); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); see *Bennett Industries*, 313 NLRB 1363 (1994). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Providence Hospital*, supra, 320 NLRB at 725; *Northcrest Nursing*

Home, supra, 313 NLRB at 491. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, supra, 295 NLRB at 490. The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1974), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). The legislative history also shows that Congress considered true supervisors to be different from lead employees or straw bosses that merely provide routine direction to other employees as a result of superior training or experience. *Id.* reprinted at 1 Legis. Hist. at 410 (LMRA 1947). *Providence Hospital*, supra, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Adco Electric*, 307 NLRB 1113 fn. 3 (1992), enfd. 6 F.3d 1110, 144 LRRM 2763 (5th Cir. 1993); *NLRB v. Security Guard Service*, supra, 66 LRRM at 2250. Further, “supervisory direction” of other employees must be distinguished from direction incidental to an individual’s technical training and expertise, and technical employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Robert Greenspan, DDS*, supra, 318 NLRB at 76; *New York University*, 221 NLRB 1148, 1156 (1976).

It is undisputed that neither Krieger nor Madden has the authority to hire, fire, transfer, promote, lay off, or recall employees or to authorize pay changes, overtime or vacations. The Employer's claim of supervisory status rests on its assertion that the journeymen responsibly direct and assign work to the helpers and effectively recommend discipline.

The record fails to establish that Krieger and Madden have independent authority to direct or assign work to the helpers. Thus, Shamberg determines the overall job assignments and duties for the journeymen as well as for the helpers. Krieger and Madden’s instructions to Bennett and Casile on the job are limited to the type that a journeyman electrician typically gives to an apprentice, based on their superior experience. See *Gerber Co.*, 270 NLRB 1235, 1237-1238 (1984); *George C. Foss Co.*, 270 NLRB 232, 234 (1984), enfd. 752 F.2d 1407, 118 LRRM 2746 (9th Cir. 1985); *IBEW Local 915 (Borrell-Bigby Electrical Company, Inc.)*, 225 NLRB 317, 319 (1976). While the journeymen check the helpers’ work, the Board has held that checking the work of less skilled employees and pointing out errors is not an indication of supervisory status. *Control Services, Inc.*, 314 NLRB 421, 431 (1994); *Phelps Community Center*, supra. In fact, the record shows that Krieger and Madden spend the bulk of their time performing the tasks of experienced journeyman electricians, rather than directing the work of the other employees at the job site. The record also does not establish that the journeymen have the authority effectively to recommend employee discipline. In general, their role is limited to reporting infractions, and the Board has held that merely reporting infractions does not confer supervisory status, particularly if higher level officials conduct an independent investigation before any disciplinary action is taken. *Northcrest Nursing Home*, supra, 313 NLRB at 491. Moreover, on the few occasions that the journeymen recommended discipline, Shamberg declined to follow their recommendations. Although the journeymen are paid far more than the helpers, this secondary indicium of supervisory status cannot transform them into statutory supervisors in the absence of any

evidence that they possess at least one of the statutory indicia. *Northcrest Nursing Home*, supra at 498; *Billows Electric Supply of Northfield, Inc.*, 311 NLRB 878 (1993). Additionally, the fact that they assist Shamberg in deciding what materials to order does not relate to any of the statutory criteria for determining supervisory status. Finally, it should be noted that if the journeymen were found to be supervisors it would create an unrealistic ratio of two supervisors to two employees. *Eddyleon Chocolate Co.*, 301 NLRB 887, 900 (1991). Based on the foregoing, I find that the Employer has not carried its burden of proving that John Krieger and Charles Madden are supervisors within the meaning of the Act. *George C. Foss Co.*, supra; *Gerber Co.*, supra. Cf. *Micronesia Telecommunications Corp.*, 273 NLRB 354, 359 (1984).³

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time journeyman electricians, helpers and apprentice electricians employed by the Employer, excluding all other employees, guards, and supervisors, as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁴ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed

³ This case is clearly distinguishable from *Prime Energy Corp.* 224 F. 3d 206 (3rd Cir. 2000), in which the Court reversed a Board decision that Shift Supervisors, a Senior Electrical Maintenance Supervisor and a Senior Mechanical Maintenance Supervisor at a co-generation plant were not Section 2(11) supervisors. In that case, the Court emphasized that a Shift Supervisor sent an employee home and issued a disciplinary recommendation, which was followed. Additionally, Shift Supervisors could authorize overtime and in an emergency could make critical decisions necessary to stabilize the plant. The Court also found that the Senior Electrical Maintenance Supervisor and Senior Mechanical Maintenance Supervisor played a significant role in hiring employees. None of these factors are present in this case.

⁴ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.⁵ Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **March 5, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

⁵ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **March 12, 2001**.

Signed: February 26, 2001

at Philadelphia, Pennsylvania

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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